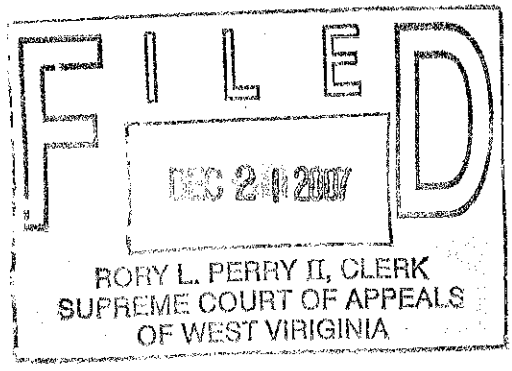
NO. 33731

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



STEVEN T. LOWE,

Appellee/Petitioner Below,

v.

JOSEPH CICCHIRILLO, Commissioner of the West Virginia Division of Motor Vehicles,

Appellant/Respondent Below.

FROM THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA

BRIEF OF APPELLANT

JOSEPH CICCHIRILLO, COMMISSIONER,
WEST VIRGINIA DIVISION
OF MOTOR VEHICLES,

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BRIEF OF APPELLANT

Comes now the Appellant, Joseph Cicchirillo, Commissioner of the West Virginia Division of Motor Vehicles (hereinafter, "Division"), by counsel, Janet E. James, Assistant Attorney General, and submits this brief pursuant to an Order received from this Honorable Court on November 27, 2007, in the above-cited matter.

I.

KIND OF PROCEEDING AND NATURE OF THE RULING BELOW

Appellant seeks reversal of the *Judgment Order* entered on March 9, 2007, by the Honorable John Lewis Marks, Jr., Judge of the Circuit Court of Harrison County (hereinafter, "Order"), in an administrative appeal styled *Steven T. Lowe v. Joseph Cicchirillo, Commissioner of the West*

Virginia Division of Motor Vehicles, Civil Action No. 06-C-431-1. Through its Order, the Circuit Court reversed an administrative driver's license revocation order entered by Joseph Cicchirillo, Commissioner of the Division, by which Steven T. Lowe's (hereinafter, "Appellee") privilege to drive was revoked on October 13, 2006.

A. THE ADMINISTRATIVE APPEAL

In the underlying administrative appeal, Appellee sought relief from the administrative order which took effect on October 13, 2006, (hereinafter, "Final Order"), wherein Commissioner Cicchirillo revoked Appellee's privilege to drive in West Virginia for a period of six months for driving under the influence of alcohol (hereinafter, "DUI"). The Circuit Court reversed the Final Order on the bases that 1) the "Commissioner erred in admitting into evidence blood alcohol content of the petitioner from blood drawn by United Hospital Center during medical treatment of the petitioner;" 2) the "commissioner erred in finding that petitioner was driving improperly when the testimony of the arresting officer was that he never observed petitioner driving and that the officer concluded that the petitioner was not at fault in the accident;" and 3) the "Commissioner erred in failing to consider and give substantial weight to the results of petitioner's criminal charge as dictated by *Choma v. W. Va. Division of Motor Vehicles*, 210 W. Va. 256, 557 S.E.2d 310 (2001)." Order at ¶¶ 2, 4, 6.

B. THE ADMINISTRATIVE PROCEEDINGS

Appellee was arrested for driving under the influence of alcohol on December 10, 2005. Deputy Shaun Fleming of the Harrison County Sheriff's Department apprised the Division of Appellee's arrest by submitting the requisite "Statement of Arresting Officer."[1] After reviewing the

[1]Exhibit 1 of the administrative record (hereinafter, "Record Exhibit 1").

Statement of Arresting Officer, the Division issued an initial order[2], dated February 7, 2006, revoking Appellee's privilege to drive in West Virginia for six months, with eligibility in ninety days, pending completion of the safety and treatment program and payment of the pertinent costs and fees.

Appellee timely requested an administrative hearing. On March 14, 2006, the Division issued a notice of hearing to Appellee by which the administrative hearing was set for May 2, 2006. After two continuances, the hearing was held on June 27, 2006. The Final Order of the Commissioner was issued on October 13, 2006[3], reinstating the initial revocation for a period of six months.

Appellee filed a *Petition for Review of Final Order* and a *Motion to Stay Commissioner's Order* in the Circuit Court of Harrison County on or about September 21, 2006. Following a hearing on or about February 26, 2007, Judge Marks entered a *Judgment Order,* from which the Division now appeals.

II.

STATEMENT OF THE FACTS

Appellee was involved in a two vehicle accident on December 10, 2005, on Old Route 50, Turkey Run Road, in Salem, West Virginia. Transcript of Administrative Hearing held on June 27, 2006, at the DMV office in Harrison County, Bridgeport, West Virginia at 3 (hereinafter, "Tr. at 3"). Deputy Shaun Fleming and Deputy Greg Scolapio of the Harrison County Sheriff's Department were dispatched to the scene of the accident. *Id.* Deputy Scolapio arrived first and spoke to the

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[2]Record Exhibit 2.

[3]Record Exhibit 13.

Appellee and observed that Appellee appeared to be intoxicated. Deputy Scolapio detected the smell of an alcoholic beverage on Appellee, and noted that Appellee had bloodshot and glassy eyes, slurred speech, and was unsteady on his feet and wobbling. Tr. at 5, 7, 9. Appellee was injured and was transported to United Hospital Center. While investigating the accident, Deputy Fleming met with Appellee at his home on January 24, 2006. Tr. at 10. Appellee admitted that he was driving his vehicle on the night of the accident and that he had drunk alcohol prior to the accident. Tr. at 10-11. Due to Appellee's admission that he consumed alcoholic beverages before driving, Deputy Fleming requested and received a search warrant for Appellee's medical records from the night of the accident from United Hospital Center that contained blood alcohol and/or other controlled substance content for the night of the accident. Tr. at 11. The search warrant was issued January 27, 2006 by Magistrate Mark Gorby. Tr. at 12. The medical records show that blood was drawn from Appellee within two hours of the accident and that Appellee had a blood alcohol content of .33. Tr. at 12, 13. After reviewing the medical records, Deputy Fleming filed a criminal complaint in the Harrison County Magistrate Court, and a warrant was issued for Appellee's arrest for driving under the influence. Tr. at 14. Deputy Fleming filed a Statement of Arresting Officer on January 31, 2006, which was received by the Appellant on February 2, 2006.

III.

ASSIGNMENTS OF ERROR

A. THE CIRCUIT COURT ERRED IN REVERSING THE FINAL ORDER UPON A FINDING THAT THE COMMISSIONER ERRED IN ADMITTING THE BLOOD TEST RESULTS INTO EVIDENCE.

B. THE CIRCUIT COURT ERRED IN REVERSING THE FINAL ORDER UPON A FINDING THAT APPELLEE WAS DRIVING IMPROPERLY.

C. **THE CIRCUIT COURT ERRED IN REVERSING THE FINAL ORDER UPON A FINDING THAT THE COMMISSIONER FAILED TO CONSIDER AND GIVE SUBSTANTIAL WEIGHT TO THE RESULTS OF APPELLEE'S CRIMINAL CASE.**

IV.

POINTS AND AUTHORITIES

A. If, upon examination of the written statement of the officer and the tests results described in subsection (b) of this section, the commissioner shall determine that a person was arrested for an offense described in section two, article five of this chapter or for an offense described in a municipal ordinance which has the same elements as an offense described in said section, and that the results of any secondary test or tests indicate that at the time the test or tests were administered the person had, in his or her blood, an alcohol concentration of eight hundredths of one percent or more, by weight, or at the time the person was arrested he or she was under the influence of alcohol, controlled substances or drugs, the commissioner shall make and enter an order revoking the person's license to operate a motor vehicle in this state. If the results of the tests indicate that at the time the test or tests were administered the person was under the age of twenty-one years and had an alcohol concentration in his or her blood of two hundredths of one percent or more, by weight, but less than eight hundredths of one percent, by weight, the commissioner shall make and enter an order suspending the person's license to operate a motor vehicle in this state.

W. Va. Code 17C-5A-1(c).

B. "Without a doubt, the Legislature enacted W.Va. Code § 29A-5-2(b) with the intent that it would operate to place into evidence in an administrative hearing '[a]ll evidence, including papers, records, agency staff memoranda and documents in the possession of the agency, of which it desires to avail itself ....' W.Va. Code § 29A-5-2(b). Indeed, admission of the type of materials identified in the statute is mandatory, as evidenced by the use of the language 'shall be offered and made a part of the record in the case ....' *Id.*"

Crouch v. West Virginia Div. of Motor Vehicles, 219 W.Va. 70, 631 S.E.2d 628, 634 (2006).

C. The blood tests in the present case were ordered by the medical personnel attending to the Petitioner subsequent to the accident. Such tests are not subject to exclusion based upon lack of conformity to the administrative requirements of West Virginia Code § 17C-5-4, and the hospital records evidencing the blood results are not subject to exclusion based upon any regulatory scheme for the handling of hospital records. We conclude that medical records containing the results of blood alcohol tests ordered by medical personnel for diagnostic purposes are subject to subpoena and shall not be deemed inadmissible by virtue of the provisions of West Virginia Code § 57-5-4d.

State ex rel. Allen v. Bedell, 193 W.Va. 32, 36, 454 S.E.2d 77, 81 (1994).

D. Records of Regularly Conducted Activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

West Virginia Rules of Evidence, Rule 803(6).

E. There are no provisions in either W.Va. Code, 17C-5-1, et seq., or W.Va.Code, 17C-5A-1, et seq., that require the administration of a chemical sobriety test in order to prove that a motorist was driving under the influence of alcohol, controlled substances or drugs for purposes of making an administrative revocation of his or her driver's license.

Syl. pt. 4, *Coll v. Cline*, 202 W. Va. 599, 505 S.E.2d 662 (1998).

F. [It is not necessary] that a police officer actually see or observe a person move, drive, or operate a motor vehicle while the officer is physically present before the officer can charge that person with DUI . . . so long as all the surrounding circumstances indicate the vehicle

could not otherwise be located where it is unless it was driven there by that person.

Syl. pt. 3, *Carte v. Cline*, 200 W. Va. 162, 488 S.E.2d 437 (1997).

V.

STANDARD OF REVIEW

This Court's review of this matter is controlled by the West Virginia Administrative Procedures Act. Review of questions of law is *de novo* (Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995)); review of factual questions is guided by whether there is evidence on the record as a whole to support the agency's decision. This Court may reverse, modify or vacate the Order of the circuit court. W. Va. Code § 29A-5-4.

VI.

DISCUSSION OF LAW

A. EVIDENCE OF THE PETITIONER'S BLOOD TEST RESULTS WAS PROPERLY ADMITTED INTO EVIDENCE AND RELIED UPON BY THE COMMISSIONER.

The Circuit Court committed error in finding that the Commissioner should not have admitted the report of Petitioner's blood alcohol content. Even the Appellee does not contest that the evidence of the Appellee's blood alcohol content on the night of the accident was properly admitted. Appellee's Circuit Court Memorandum at p. 6.

In an interview with Dep. Fleming on January 24, 2006, the Appellee admitted to Dep. Fleming that he was driving the vehicle on the night of the accident, and that he had been drinking prior to driving the vehicle. Tr. at 10-11. Following the interview, Dep. Fleming obtained a search warrant from the Magistrate and obtained a copy of the Appellee's blood test from United Hospital

Center. Tr. at 11. The Appellee's blood was drawn at 9:54 p.m., following the crash, which occurred at 8:48 p.m.

Dep. Fleming attached the results of the blood test to the Statement of Arresting Officer, and submitted it to the Division. They therefore became part of the Division's records and were properly admitted in the record at the outset of the hearing pursuant to W. Va. Code § 29A-5-2. Indeed, their admission was mandatory.

> Without a doubt, the Legislature enacted W.Va. Code § 29A-5-2(b) with the intent that it would operate to place into evidence in an administrative hearing '[a]ll evidence, including papers, records, agency staff memoranda and documents in the possession of the agency, of which it desires to avail itself ....' W.Va. Code § 29A-5-2(b). Indeed, admission of the type of materials identified in the statute is mandatory, as evidenced by the use of the language 'shall be offered and made a part of the record in the case ....' *Id.*

Crouch v. West Virginia Div. of Motor Vehicles, 219 W.Va. 70, 631 S.E.2d 628, 634 (2006). The Circuit Court did not address *Crouch* in its Judgment Order.

Although the Circuit Court failed to elaborate on its general proposition that "The West Virginia Rules of Evidence apply in Contested Administrative Agency Cases (W. Va. Code § 29A-5-2)" (Judgment Order at ¶ 1), it seems reasonable to assume that the Circuit Court made the Statement as a basis for finding that the blood test results were not admissible. If that is the case, the Circuit Court erred. As was noted in *Crouch*,

> Although W. Va. Code § 29A-5-2(a) has made the rules of evidence applicable to DMV proceedings generally, W. Va. Code § 29A-5-2(b) has carved out an exception to that general rule in order to permit the admission of certain types of evidence in administrative hearings that may or may not be admissible under the Rules of Evidence. Moreover, inasmuch as we view W. Va. Code § 29A-5-2(a) as a statute pertaining to the application of the Rules of Evidence to administrative proceedings generally, while W. Va. Code § 29A-5-2(b) specifically addresses the admission of particular

> types of evidence, W. Va. Code § 29A-5-2(b) would be the governing provision.

631 S.E.2d 633. Thus, W. Va. Code § 29A-5-2(b) takes precedence over the Rules of Evidence. Furthermore, in Footnote 10 of *Crouch*, this Court noted, "Assuming arguendo that the West Virginia Rules of Evidence were to apply to this issue, the 'STATEMENT OF ARRESTING OFFICER' would nevertheless be admissible." Thus, the test results, which were attached to and made a part of the Statement of Arresting Officer (Administrative Record Exhibit 1), are admissible pursuant to W. Va. Code § 29A-5-2 and Rules of Evidence.

As noted above, neither party contests the admissibility of the test results. At issue is the weight given to the results. Footnote 12 of *Crouch* illustrates the point:

> We point out that the fact that a document is deemed admissible under the statute does not preclude the contents of the document from being challenged during the hearing. Rather, the admission of such a document into evidence merely creates a rebuttable presumption as to its accuracy.

In the present case, no evidence was offered by the Appellee to undermine the authenticity of the blood test results once they were admitted. Inasmuch as the Petitioner failed to rebut the accuracy of the blood test results, the Commissioner properly gave them weight.

In further support of the Commissioner's reliance on the blood test results, *State ex rel. Allen v. Bedell*, 193 W.Va. 32, 454 S.E.2d 77 (1994) affirms the admissibility of the test results:

> The blood tests in the present case were ordered by the medical personnel attending to the Petitioner subsequent to the accident. Such tests are not subject to exclusion based upon lack of conformity to the administrative requirements of West Virginia Code § 17C-5-4, and the hospital records evidencing the blood results are not subject to exclusion based upon any regulatory scheme for the handling of hospital records. We conclude that medical records containing the results of blood alcohol tests ordered by medical personnel for diagnostic purposes are subject to subpoena and shall not be deemed

inadmissible by virtue of the provisions of West Virginia Code § 57-5-4d.

193 W. Va. 36, 454 S.E.2d 81. *Allen* shows that the Circuit Court clearly erred in holding, "The Commissioner erred in admitting [the results of the blood test] by finding that it was not necessary to comply with Health Department regulations and W. Va. Code § 17C-5-6..." Judgment Order at ¶ 2. W. Va. Code § 17C-5-6 pertains to tests administered at the direction of a law-enforcement officer, not tests done for diagnostic purposes, as was the case here. Under *Allen*, the Appellee's blood test results were clearly admissible.

The Commissioner was required to admit the blood test results into the record at the administrative hearing. When there was no challenge to their accuracy, the Commissioner properly relied on the test results in the Final Order. Of course, even without the blood test results, there remains a preponderance of the evidence to uphold the revocation of his license. *Coll v. Cline*, 202 W.Va. 599, 505 S.E.2d 662 (1998).

B. THE COURT ERRED IN REVERSING THE FINAL ORDER BASED UPON THE COMMISSIONER'S FINDING THAT APPELLEE WAS DRIVING IMPROPERLY.

The Circuit Court's finding that the Commissioner erred in finding that Petitioner was driving improperly and that he was not at fault in the accident is curious and in error inasmuch as the only issue in that regard is whether there was reasonable suspicion for the officers to investigate.

The finding by the Commissioner in the Final Order that Petitioner was driving improperly was clearly attributed to the Petitioner's admission to passing a vehicle before the accident. It is undisputed that neither officer saw Petitioner driving; reasonable suspicion for investigation arose from the accident. When Dep. Fleming interviewed the Appellee several weeks later, he readily

admitted that he had been drinking and driving on the night in question. State Exhibit 1. At the hearing, Dep. Fleming reiterated the admissions of the Appellee during the interview, none of which was refuted by the Appellee. Tr. at 10-11. In the Final Order, the Commissioner noted the admission of the Appellee to passing a vehicle, and noted that this "indicated" that the Appellee was driving improperly. The Circuit Court's finding at ¶ 4. is absolutely unfounded as a basis for reversing the revocation.

It is not necessary that an arresting officer observe a driver operating a motor vehicle if the surrounding circumstances indicate that he was the driver of the vehicle. This Court has noted that it is not necessary

> that a police officer actually see or observe a person move, drive, or operate a motor vehicle while the officer is physically present before the officer can charge that person with DUI . . . so long as all the surrounding circumstances indicate the vehicle could not otherwise be located where it is unless it was driven there by that person.

Syl. pt. 3, *Carte v. Cline*, 200 W. Va. 162, 488 S.E.2d 437 (1997). In *Carte*, the driver was found passed out behind the steering wheel of a car which was sitting in an access driveway to a shopping center. The car was at a stop light with the engine running. The transmission was in drive but the driver had his foot on the brake. *Carte*, 200 W. Va. at 163-64, 488 S.E.2d at 438-39. The police officer never saw the car move. Nonetheless, the circumstances satisfied the requirement that the arresting officer establish by a preponderance of the evidence that the driver was operating a motor vehicle in this State while under the influence of alcohol. *Carte*, 200 W. Va. at 167, 488 S.E.2d at 442.

It is only necessary to show that Appellee was driving. It is not necessary that the officer saw him drive, and it is irrelevant whether he was driving improperly. The circuit court erred in reversing the Final Order on this basis.

C. THE CIRCUIT COURT ERRED IN REVERSING THE FINAL ORDER UPON A FINDING THAT THE COMMISSIONER FAILED TO CONSIDER AND GIVE SUBSTANTIAL WEIGHT TO THE DISPOSITION OF APPELLEE'S CRIMINAL CHARGE.

The circuit court erred in finding that the Commissioner failed to consider and give substantial weight to the Criminal Case History submitted by the Appellee at the administrative hearing, and, as a factual matter, in finding that Appellee was found "not guilty" of the DUI charge. Judgment Order at ¶ 5. In fact, the Commissioner dealt with the criminal disposition at length in the Final Order.

In the Final Order, the Commissioner noted that there was a directed verdict of acquittal at the conclusion of the State's case, as was noted on the abstract of judgment submitted by the Appellee. The Hearing Examiner then noted that no evidence was given as to why a directed verdict of acquittal was rendered. Final Order at 7. Although the Final Order notes that "it would be impossible for this Hearing Examiner to consider and give substantial weight to the results of any criminal proceedings," in fact he did so. The Hearing Examiner noted in full detail the information contained on the Criminal Case History, including the abstract of judgment. However, inasmuch as there was no testimony or other evidence offered regarding the outcome of the criminal case, the Hearing Examiner correctly concluded that there was not enough evidence of the reasons for acquittal to overcome the facts in the administrative record. Final Order at 8.

Thus, the Commissioner correctly proceeded with issuance of the Final Order based upon the evidence adduced at the administrative hearing. As this Court noted in *Choma v. West Virginia*

Division of Motor Vehicles, 210 W. Va. 256, 557 S.E.2d 310 (2001), "This holding places no affirmative duty on the Commissioner to obtain or adduce information about other proceedings." 210 W.Va. at 260 n.4, 557 S.E.2d at 314 n.4. When the appellant made a similar argument before this Court in *Choma*, the Court responded as follows:

> The appellant takes the position that even though the burdens of proof are different, exoneration in a criminal DUI proceeding should be *res judicata* and dispositive in favor of the driver in an administrative license suspension proceeding. However, "[i]t is the general rule that a judgment of acquittal in a criminal action is not *res judicata* in a civil proceeding which involves the same facts." Syllabus, *Steele v. State Road Commission*, 116 W.Va. 227, 179 S.E. 810 (1935).

Choma, 210 W. Va. 260, 557 S.E.2d 314. Pursuant to *Choma*, the acquittal must be considered if entered into evidence at the administrative hearing, but it is not dispositive: "[F]undamental fairness requires that proof of an acquittal in that same criminal DUI proceeding should be admissible and have weight in a suspension proceeding." *Id.* A close reading of the Final Order will show that indeed the Commissioner considered and give appropriate weight to the evidence of the results of the criminal proceedings. The Commissioner properly found that this evidence did not outweigh other evidence in the record, and correctly found that there was sufficient evidence to show that Appellee was DUI on December 10, 2005.

VII.

PRAYER FOR RELIEF

WHEREFORE, based upon the foregoing and for such other reasons as may appear to the Court, Appellant hereby prays that the Order entered by the Circuit Court of Harrison County on March 9, 2007, reversing the Final Order of the Commissioner on October 13, 2006, be reversed and vacated, and remanded with directions to affirm the Final Order.

Respectfully submitted,

JOSEPH CICCHIRILLO, COMMISSIONER, WEST VIRGINIA DIVISION OF MOTOR VEHICLES,

By counsel,

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CERTIFICATE OF SERVICE

I, Janet E. James, Assistant Attorney General, do hereby certify that the foregoing *Brief of Appellant* was served upon the following by depositing a true copy thereof, postage prepaid, in the regular course of the United States mail, this 21st day of December, 2007, addressed as follows:

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JANET E. JAMES